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No. 75-1882

In the Supreme Court of the United States

OCTOBER TERM, 1976

LARRY GLOVER CARTER AND
GREGORY HALL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 535 F. 2d 1255.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1976. On May 17, 1976, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including June 28, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether proof that a firearm has previously traveled in interstate commerce may establish possession

of a firearm "in commerce or affecting commerce" under 18 U.S.C. App. 1202(a).

2. Whether petitioner Carter was properly convicted under 18 U.S.C. 924(c)(2) for unlawfully carrying a firearm during the commission of a felony.

3. Whether the evidence was sufficient to sustain petitioners' convictions of conspiring to distribute heroin.

STATUTE INVOLVED

18 U.S.C. App. 1202 provides, in pertinent part:

> (a) *Persons liable; penalties for violations.*
>
> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * *
>
> * * * * *
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846. Petitioner Carter was also convicted of attempted sale of heroin, in violation of 21 U.S.C. 846, unlawfully carrying a weapon during the commission of a felony, in violation of 18 U.S.C. 924(c)(2), and receipt and possession of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner Hall was sentenced to five years' imprisonment, to be followed by a three-year special parole term. Petitioner Carter was sentenced to concurrent ten-year terms of imprisonment on the conspiracy and attempted sale counts, and consecutive terms of five years' imprisonment on the Section 924(c)(2) count and two years on the Section 1202 (a)(1) count, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App.).

On April 9, 1974, Dorothy Weisenberger, an undercover Detroit police officer, accompanied by Wilbert Morgan, an informant, met petitioner Hall at petitioner Carter's residence and discussed the purchase of an eighth of a kilo of heroin (Tr. 55-58, 702). Hall said that he did not have any heroin at that time, but that he would attempt to contact Carter (Tr. 702). He instructed them to call back that evening to find out what arrangements could be made (Tr. 703). When Morgan called, as directed, Hall told him that he had been unable to contact Carter. Morgan left his telephone number with Hall and told Hall to have Carter call him (Tr. 62-63).

The following morning, petitioner Carter called Morgan, discussed the transaction, and told him that the heroin would be available the next day; it was "in storage" at that time (Tr. 66). As instructed, Morgan and Officer Weisenberger met petitioners at Carter's residence and gave Carter $3,700—the price Hall had quoted to Morgan (Tr. 97-98, 703).

Morgan and Weisenberger then waited approximately two hours for the heroin to be delivered by someone "from the east side" (Tr. 106, 109). During the wait, Morgan asked Hall when the heroin would arrive. Hall responded: "She on the way" (Tr. 107). On another occasion, Carter directed Hall to "go downstairs and call * * * and see what's taking her so long" (Tr. 107). Hall went downstairs

and reported back "that the person was already on the way over" (Tr. 714).

As they continued to wait for the delivery, petitioner Carter managed to get Officer Weisenberger in a bedroom alone, where he made sexual advances. When she refused, he displayed a pistol and struck her with it. Morgan, who was wearing a transmitter (Tr. 71-72), heard the officer scream and came to her assistance (Tr. 113). Carter also assaulted him with the pistol (Tr. 115-118). At that time, police officers monitoring the transmitter forcibly entered the residence to rescue the undercover detective and arrested petitioners (Tr. 118-120).

DISCUSSION

1. Petitioner Carter contends that the court of appeals erred in construing 18 U.S.C. App. 1202(a) to prohibit convicted felons from possessing firearms that previously traveled in interstate commerce but did not have a "contemporaneous nexus" with commerce at the time of the charged possession (Pet. 6-9).

The weapon that Carter possessed was manufactured by the Ruger Firearm Company, which is located in Connecticut. A Michigan resident purchased the firearm on February 9, 1962, and subsequently reported it stolen in 1972 (Tr. 678; Govt. Exh. 9). It was found in Carter's possession on April 11, 1974. Carter had previously been convicted of a felony in Detroit Recorder's Court (Pet. 5).

This issue concerning the proper construction of Section 1202(a) is identical to that presented to this Court in the petition for a writ of certiorari in *Scarborough* v. *United States*, No. 75-1344. For the reasons stated in our memorandum in that case (pp. 4-7), a copy of which we are sending to petitioner Carter, we believe the court of

appeals properly resolved this issue in the government's favor. Nevertheless, because there is a conflict among the circuits on this issue and it is a question of considerable importance to the administration of the gun control laws, we acquiesced in the request for review by this Court in *Scarborough*. We accordingly submit that it would be appropriate to hold Carter's petition for disposition in accordance with the disposition of *Scarborough*.[1]

2. Both petitioners contend that there was insufficient evidence to support their convictions for conspiring to distribute heroin.[2] They assert that the evidence failed to show that petitioner Hall was a member of the conspiracy, and since the two alone were charged as co-conspirators, their convictions must be reversed. This claim is without merit.

Viewing the evidence in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), it shows that petitioner Hall actively participated in the transaction and "[sought] by his action to make it succeed." *Nye & Nissen* v. *United States*, 336 U.S. 613, 619, quoting *United States* v. *Peoni*, 100 F. 2d 401, 402 (C.A. 2). Not only did Hall agree to contact Carter to arrange the purchase, but he also told the buyers the

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[1]A violation of 18 U.S.C. 924(c)(2) requires that a firearm be carried during the commission of a felony, and that the carrying be unlawful. In this case the "carrying" occurred during the drug offenses for which Carter was convicted. The "unlawfulness" of the carriage was predicated on Carter's possession of the weapon in violation of 18 U.S.C. App. 1202(a). Since the validity of his conviction for the latter offense rests upon disposition of the interstate nexus issue, the Court should dispose of Carter's Section 1202(a) and Section 924(c)(2) convictions together.

[2]Petitioner Carter alone was convicted of attempting to distribute heroin. He does not contend that there was insufficient evidence to sustain that conviction.

price. The fact that Carter called the informant the following day to discuss the transaction showed that Hall did in fact arrange the purchase with Carter. Furthermore, while the informant and the police officer awaited the delivery, Hall followed Carter's directions and called the person (or persons) who was delivering the heroin to find out what was causing the delay. In these circumstances, the jury could reasonably infer that Carter and Hall were actively engaged together in the same enterprise.[3]

CONCLUSION

Petitioner Carter's petition, insofar as it presents issues regarding the firearms offenses of which he was convicted, should be disposed of in light of this Court's disposition of *Scarborough* v. *United States*, No. 75-1344. In all other respects the petition should be denied.

Respectfully submitted.

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[3]Petitioners' reliance (Pet. 12-14) on *United States* v. *Hysohion*, 448 F. 2d 343 (C.A. 2), which held that informing a willing buyer how to contact the seller does not necessarily imply an agreement between the informant and the seller, is misplaced. Assuming, *arguendo*, that *Hysohion* is correct, petitioner Hall did more than inform the undercover official how to contact Carter. As shown above, Hall not only contacted Carter himself, but he also took an active part in the transaction.

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